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mine file

September 13, 1989

Mr. Robert Hagen, Director
Albuquerque Field Office
Office of Surface Mining
Reclamation and Enforcement
Suite 310, Silver Square
625 Silver Avenue, SW
Albuquerque, New Mexico 87102

Dear Bob:

Re: Comments on Draft Analysis of the Sunnyside Mine Permit
Transfer, ACT/007/007, Carbon County, Utah

Thank you for the opportunity to provide comments on the draft analysis. As you review these comments, please contact me if you have further questions.

1. Question: Did DOGM suspend the Kaiser permit and, if so, did DOGM reinstate the permit prior to allowing SRS to commence mining?
2. Determination: DOGM did suspend the permit. DOGM did reinstate the permit prior to allowing SRS to commence mining.
3. Discussion:
 1. DOGM suspended the Sunnyside Mine permit, on its own initiative, in the July 21, 1988 letter, "until an alternative bond in the full amount is posted" (emphasis added). The condition for reinstatement, i.e., posting of an alternative bond, is significant in that it clearly defines the action necessary for termination of suspension.
 2. The Division has authority to suspend a permit in §40-8-7(1)(h) U.C.A.:
 - (1) The board and the division may require:
 - (h) The suspension of mining operations in case of emergency conditions;

and in §40-10-6 (9) U.C.A.:

In addition to those provided in Chapter 8 of Title 40, the board and division shall have the following powers, functions, and duties:

- (9) To do all other things and take such other actions retroactively or otherwise within the purposes of this chapter as may be necessary to enforce its provisions.

The Division did what was appropriate under the circumstances at the time. The bankruptcy judge had just ruled that Utah was not subject to the automatic stay. Simultaneously, there was a move afoot for Kaiser to provide BP Minerals with a lease. The Division was free from threat of a contempt action to act immediately to suspend the permit to ensure that no further mining occurred without adequate surety.

It should also be noted that nothing in the rules required Kaiser to recognize the suspension.

3. DOGM also, at the request of Kaiser Coal on July 28, 1989, approved a temporary cessation of operations. At the same time the Division was considering its response (the suspension) to the Bankruptcy Court Order, the members of the Board of Directors of Kaiser were considering their responsibilities and liabilities concerning Sunnyside's operations. Mining operations had been temporarily shut down by MSHA for safety reasons. The Board decided not to resume operations, and requested that the Division place the mine on temporary inactive status.

While these actions, suspension and temporary cessation, may seem redundant, it is important to recognize that they were initiated by different parties and for different reasons.

4. Since the Division acted under a broad grant of enforcement authority, there are no corresponding rules which are applicable. Once the Division was sure that adequate surety had been provided, it authorized mining activity under the permit. It is true that the Division did not use the words: "lift the suspension." However, the wording the Division used had the effect, by stating that "... SRS shall have the right, commencing on the [effective date of the surety] and pending the completion of [the] transfer, to conduct mining, reclamation and all necessary related activities and operations in and upon the Mine pursuant to the Permit." (Paragraph 7 of the Reclamation Contract of March 3, 1989). By the Division's and SRS' words and actions, the suspension was lifted.

5. Furthermore, as noted by OSM, the March 13, 1989 letter from SRS to DOGM provided the necessary notification that SRS intended to return the Sunnyside Mine active status. That action does not require a request for release from temporary cessation, but rather a notice of intent to resume operations.
2. Question: Was SRS acting as a subcontractor for Kaiser prior to permit transfer?

Determination: Prior to permit transfer, Kaiser was the permittee, the entity responsible for operations under the permit. SRS was operating as a "contractor" or "subcontractor", under Kaiser's permit.

Discussion:

1. The term "contractor" or "subcontractor" is used loosely to identify an entity other than the permittee who conducts operations under the permittee's permit. The documents between Kaiser and SRS transferred property ownership, but not the right (the permit) to operate the mine. Only the Division had the authority to make that transfer.

Therefore, SRS was conducting bonded mining operations under the valid Kaiser permit.

2. DOGM Rule 788.18 speaks in terms of what must be done to accomplish a permit transfer. It provides that no transfer is effective without written approval. It does not say that no mining operations will be conducted under the permit without a transfer of the permit. Further, Rule 788.19 expressly provides that:

(a) A successor in interest to a permittee who is able to obtain the bond coverage of the original permittee may continue underground/surface coal mining and reclamation activities according to the approved mining and reclamation plan and permit of the original permittee.

Rules 788.18 and 788.19(a) are not in conflict since there is no language limiting the application of 788.19 to after the permit transfer. In fact, if 788.19 is interpreted to require the transferee to comply with the permit conditions after the transfer of the permit, 788.18(c)(3) would be redundant. That rule directs the Division to find that:

[T]he applicant will continue to conduct the operations involved in full compliance with the terms and conditions of the original permit....

If the applicant is required to comply with the terms of the original permit under 788.18(c)(3) (unless, of course, a new permit has been acquired), what would be the sense of having the permissive language (the successor in interest "may" continue operations) of 788.19(a) applying to the same situation?

Regardless of the outcome of discussions of the scope and application of 788.19(a), the Division had a good foundation for the above interpretation. The Division has applied that rule in this fashion for several years without issue.

3. Question: Did DOGM conduct the permit transfer in accordance with its approved program prior to allowing SRS to commence mining?

Observation: The question being asked should really be stated as two questions:

- 3.1 Did DOGM conduct the permit transfer in accordance with its approved program?
- 3.2 Did SRS commence mining operations in accordance with the Utah program?

Determination:

1. Question 3.2 was answered in the response to OSM's Question 2. The answer is yes, the Utah program allows SRS, with proper reclamation bonding, to commence mining under the Kaiser permit.
2. DOGM did conduct the permit transfer in accordance with its approved program.

Discussion:

1. At the time SRS commenced mining they had posted the necessary reclamation surety for the Sunnyside Mine. However no permit transfer had occurred. None of the March 9, 1989 documents constitute a permit transfer. The permit remained in Kaiser's name. Keep in mind that the Division was under no obligation to finalize a permit transfer to SRS. The Division agreed to process a transfer "... in the ordinary course of its business...." Arguably, if, in the ordinary course of its business, the Division determined that SRS did not qualify for a permit transfer, the Division could deny the transfer. The fate of the bond would then undoubtedly have become a litigation issue, but no guarantee of transfer was included.

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2. Furthermore, SRS had informally supplied the Division with the pertinent information and the Division had informally run a 510(c) check prior to signing the Reclamation Contract.
3. It seems that the real issue is whether the Division was acting outside of the rules in authorizing SRS to conduct coal mining operations prior to the formal permit transfer. This question was answered in response to OSM's Questions 1 and 2, above.

Therefore, it is DOGM's determination that its actions were appropriate to the situation and in accordance with the Utah program.

Please let me know if you need additional information.

Best regards,



Dianne R. Nielson
Director

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